

Docket: 2006-1432(GST)G

BETWEEN:

TORONTO DISTRICT SCHOOL BOARD,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeals heard on December 3, 2008, at Toronto, Ontario

By: The Honourable Justice Campbell J. Miller

Appearances:

Counsel for the Appellant: Salvatore Mirandola
and Jennifer Leve
Counsel for the Respondent: Ernest Wheeler

JUDGMENT

The appeals from assessments made under the *Excise Tax Act*, notices of which are dated October 24, 2005, for the periods August 27, 2002 to October 31, 2003 and November 1, 2003 to February 18, 2004, respectively, are dismissed, with costs.

Signed at Ottawa, Canada, this 20th day of January 2009.

“Campbell J. Miller”

C. Miller J.

Citation: 2009 TCC 39
Date: 20090120
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BETWEEN:

TORONTO DISTRICT SCHOOL BOARD,

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Respondent.

REASONS FOR JUDGMENT

Miller J.

[1] This is an intriguing story of money, politics, schools, jurisdiction and the Constitution, but ultimately there is a question of law to be determined.

[2] Pursuant to an Ontario Order-in-Council dated August 27, 2002, control and charge over the administration of the affairs of the Toronto District School Board (“TDSB”) was vested in the Ministry of Education of the Province of Ontario. The Ministry of Education appointed a supervisor, Mr. Christie, who remained in place until the end of October 2003. In October 2003, a three-person co-management team was appointed by the Minister of Education under the newly-elected Liberal Government, upon the resignation of Mr. Christie. The vesting order was revoked in February 2004. The TDSB sought a rebate of 32% of the Goods and Services Tax paid by it, during the vesting order period (beyond the 68% rebate to which it had previously been entitled) effectively seeking a 100% rebate. The rebate claimed by TDSB was based on their position that during the vesting order period the TDSB was, in effect, the Province of Ontario or an agent of the Province of Ontario, and therefore, pursuant to section 125 of the *Constitution Act, 1867*¹ and section 122 of the *Excise Tax Act*² immune from payment of GST.

¹ (U.K.), 30 & 31 Victoria, c.3.

² R.S.C. 1985, c. E-15, as amended.

[3] The Canada Revenue Agency denied the rebate application on the basis that TDSB was not the Province of Ontario, nor an agent of the Province of Ontario. At trial, the Respondent argued even if the TDSB was a Crown agent, such agency did not extend to acquiring property and services on behalf of the Minister. The Respondent also argued that if the TDSB was an agent of the Province of Ontario, it was subject to the reciprocal taxation agreement between Ontario and Canada pursuant to which no immunity was extended to the TDSB. Further, as a Crown agent, it had no standing in any event to file the rebate claim nor to bring this action. Finally, if the TDSB does have standing, it is precluded from making the rebate claim by the application of section 262 of the *Excise Tax Act*, which prohibits filing a second-rebate claim.

The Facts

[4] The TDSB is a corporation governed by the provisions of the *Education Act*.³ It is governed by a Board of 22 elected Trustees who make decisions with respect to finance, staff and the business of the school board generally. The TDSB does not seek Ministerial approval for decisions, but operates autonomously from the Minister, subject to the Government's funding allocation and the requirements of the *Education Act* to present a balanced budget. The Appellant's funding is derived from residential property tax revenue, business property tax revenue, provincial grants and other sources such as tuition fees from non-residents and the rental, lease or sale of surplus properties. The TDSB's Chief Executive is the Director of Education. There are Executive Superintendents for business services, human resources, facilities, programs and school services, legal and equity. There are also 24 Superintendents responsible for 24 districts in the Toronto region. The TDSB is a registered charity and a GST registrant. It files monthly GST returns and is entitled to a 68% rebate in accordance with section 259 of the *Excise Tax Act*.

[5] The TDSB undergoes an annual budget process which starts in the fall of each year leading to the filing of a balanced budget with the Government of Ontario by the end of the following June. In June 2002, the Board did not file any budget, as the Trustees could not reach agreement on a balanced budget. In January/February of 2002, it was evident to the Trustees that they faced a \$90 million shortfall. The Trustees refused to cut \$90 million to present a balanced budget. In August, the Minister appointed an investigator, who reported by August 20, 2002 recommending that control and charge over the administration of the affairs of the TDSB be vested

³ R.S.O. 1990, c. E.2, as amended.

in the Ministry, in accordance with Division D of Part IX of the *Education Act*. The Minister accepted that recommendation and on August 27, 2002, an Order-in-Council issued stating:

NOW THEREFORE, under *Education Act*, R.S.O. 1990, c.E.2, s. 257.31(2), control and charge over the administration of the affairs of the Toronto District School Board be vested in the Ministry of Education;⁴

[6] On August 30, 2002, the Minister appointed Mr. Paul Christie under subsection 257.48(2) of the *Education Act* as Supervisor. It was clear from Mr. Christie that he was known to the Conservative Government, and he admitted allegiance to the Government of the day. It is important to note the Terms of Reference of Mr. Christie's appointment.

**TERMS OF REFERENCE
SUPERVISOR, TORONTO DSB**

The powers and duties of the supervisor shall be in accordance with the sections set out in Part IX, Division D of the *Education Act*.

In carrying out his/her duties, the supervisor shall prepare and implement a plan to return the Toronto District School Board to a balanced financial position, taking into account the recommendations and findings outlined in the investigator's report.

The supervisor is delegated the control and charge over the exercise and performance by the board of its powers, duties, and obligations with respect to all matters including, but not limited to, matters respecting those items outlined in section 257.33 of the *Education Act*.

For this purpose, the supervisor shall:

1. develop a communication strategy to inform parents, board trustees/staff and members of the public what is happening and to reassure them of the continuance of the Toronto District School Board and its commitment to provide a quality education for students.
2. ensure cash flow availability to meet the financial obligations of the board.
3. seek the advice of board trustees, staff and other parties in any matter that he/she deems appropriate, including the establishment of board committees.
4. develop a strategic plan that will return the board to a balanced financial position, taking into account the recommendations and findings outlined in

⁴ Joint Book of Documents, Exhibit A-1, Volume 1, Tab 6.

the investigator's report. The plan is to identify specific action that will be implemented to achieve this purpose.

5. direct and oversee the implementation of the plan.
6. provide progress updates to the Assistant Deputy Minister, Elementary/Secondary Business and Finance.⁵

[7] As Mr. Christie acknowledged, he believed his scope was broad – “L'état est moi”. I conclude that he had broader powers than the Trustees themselves.

[8] On September 17, 2002, Mr. Christie, with the assistance of Mr. McVicar, also appointed by the Government to assist Mr. Christie, published guidelines of the roles and rules and responsibilities of Trustees, which included:

...

2. All committees and meetings of the Board, including special meetings, are suspended for the month of September.
3. Board and committee meetings will resume in October as scheduled to receive information, approve minutes and provide advice to the Supervisor through the Director.

...

6. Committee work to develop policy recommendations will be restricted to staff. All policy will be reviewed and approved by the Supervisor. A complete review of all policies has been initiated.
7. All personnel issues and staff changes will be approved by the Supervisor or otherwise managed according to a process to be approved by the Supervisor.
8. All Trustee initiatives requiring the expenditure of Board resources or the involvement of staff will be subject to the approval of the Supervisor through the Director.
9. Trustee written communication to the broader community and external stakeholders, as provided through Board resources and at Board expense, including courier services, is suspended until further notice.

...

⁵ Terms of Reference – Supervisor, Toronto DSB, Joint Book of Documents, Exhibit A-1, Volume 1, Tab 7.

11. No expenses over stipend and no expenses that exceed the *Education Act* will be paid. All expenses for conferences will be approved by the Supervisor. ...⁶

[9] This gives the flavour of their restrictive nature. Mr. Christie acknowledged they were not well-received by the Trustees. Though they could not meet formally, the Trustees could, and did, hold informal public meetings, though with no authority to conduct any business.

[10] In November 2002, Mr. Christie issued a subsequent memo relaxing the restrictions somewhat and suggesting that the Trustees could meet to consider matters that he put to them. He also allowed them to requisition a meeting, though again made it clear they had no power to exercise at such meetings. While they did offer advice, it was clear that Mr. Christie had no obligation to accept such advice and often did not. He kept the Director of Education as a buffer between himself and the Trustees. He looked very much more to the TDSB staff to assist in his decision-making than the Trustees. Indeed, Mr. Higgins, the Executive Superintendent of Finance, indicated that Mr. Christie always followed his financial advice.

[11] In working primarily with staff, Mr. Christie was able to release a balanced budget to the media on November 19, 2002 for the 2002-2003 budget. He acknowledged that the Trustees had very little role in reaching this objective, while staff had a significant role. Mr. Christie also met regularly with the Assistant Deputy Minister, Mr. Hartmann, and the finance staff at the Ministry of Education. He occasionally met with people in the Premier's office and also with Members of Caucus to get a better understanding of the political picture. It was decided with the Ministry that some deficit could be expensed over time.

[12] In July 2003, Mr. Christie released the 2003-2004 budget, having gone through a similar process as the previous year. This budget showed a \$54 million deficit. Mr. Christie explained that as long as he satisfied the Ministry that the TDSB had a plan to manage itself out of deficit financing, in a three-year recovery plan, the one-year budgetary deficit would be acceptable. As Mr. Christie put it, when he advised the Assistant Deputy Ministry, the Premier's office and the Caucus Members of the drastic consequences of further reductions, there was no political appetite to force a balanced budget.

⁶ Memorandum dated September 17, 2002, Joint Book of Documents, Exhibit A-1, Volume 1, Tab 8.

[13] During his term as supervisor, Mr. Christie documented 401 decisions over 35 decision-making meetings. Mr. Tomczak, the Senior Manager of Board Services, did the documenting of these decisions, as he met daily with Mr. Christie for many months. These decision-making meetings were mainly with the Director of Education and the senior management team. Mr. Christie also had many informal meetings with staff. The Trustees did not attend these meetings, though Mr. Christie did occasionally seek their advice, as this was mandated in his Terms of Reference.

[14] Both Mr. Tomczak and Mr. Christie went through several of the 401 decisions that Mr. Christie made, to give me some flavour of the nature of those decisions. It was clear that Mr. Christie could, and did, make decisions on every aspect of Board business. Mr. Tomczak went so far as to suggest Mr. Christie could make decisions on information items, not even calling for decision. He stated the Trustees would never do such a thing – there was a clear demarcation between the responsibilities of the Trustees versus those of the staff. Not so with Mr. Christie; he could be involved in everything.

[15] Mr. Christie spoke to Government officials throughout his tenure, though this came to an abrupt halt when the Liberal Government came into power in the fall of 2003. It was clear to Mr. Christie that they had a different agenda to get back to a community based, democratic governance structure. The Assistant Deputy Ministry suggested that Mr. Christie might want to have his resignation at the ready. He did and his resignation was accepted on October 31, 2003. Mr. Christie summed up his time as supervisor in two ways: first, that he changed the financial course of the TDSB; and second, that he always acted on the assumption he was acting for the TDSB with the sanction of the Minister, accountable to students and parents.

[16] For the period from October 31, 2003, until the revocation of the vesting order in February 2004, the new Government put control and charge over the administration of the affairs of the TDSB in the hands of a co-management team, consisting of Mr. Hartmann, the Assistant Deputy Minister, Ms. Shelley Laskin, the Chair of the Board of Trustees, and Mr. David Reid, the Director of Education. They were charged with day-to-day operations of the TDSB with authority to exercise all powers and perform duties conferred on the Minister under Division D of Part IX of the *Education Act*. In effect, they replaced Mr. Christie with the same mandate, though rather than a one-man show there was now a triumvirate representing Government, Trustees and the staff. According to Mr. Tomczak, it was a way to ease back to the Trustees while ensuring the budget did not unravel. Trustee Committee structures were put back in place during those few months, though decisions still

were subject to the co-management Team approval. There was less interaction between the staff and the co-management team as there was previously between staff and Mr. Christie. The co-management team would receive advice from the Trustees, though again, would not always follow it.

[17] Mr. Tomczak attended all co-management team decision-making meetings. He was clear that if there were any disagreements it would be Mr. Hartmann, the Assistant Deputy Minister, who would have the final word.

[18] Throughout the supervisory period and co-management period, the TDSB never lost its status as a separate legal corporate entity; property was bought and sold in its own name, it prepared its own financial statements and employees remained employees of the TDSB. As Mr. Higgins summarized, the main difference was the process of decision-making which was much simplified.

[19] By Order-in-Council of February 2004, the vesting order was revoked. In March 2004, the TDSB filed its application for a rebate of approximately \$6,590,000 and \$1,771,000 as rebates of tax paid in error in accordance with section 261 and 262 of the *Excise Tax Act* during the supervisory period and the co-management team, respectively. The Minister denied these claims.

Legislative Framework

[20] Section 125 of the *Constitution Act, 1867* applies to prohibit imposition of GST on Provincial Governments or their agents:

125 No Lands or Property belonging to Canada or any Province shall be liable to Taxation.

[21] Section 122 of the *Excise Tax Act* obliges the province, as a supplier, to collect and remit tax, though makes no mention of an obligation on the province to pay tax:

122 This Part is binding

(a) ...

(b) on Her Majesty in right of a province in respect of obligations as a supplier to collect and to remit tax in respect of taxable supplies made by Her Majesty in right of the province. ...

[22] Subsection 259(3) of the *Excise Tax Act* permits TDSB to apply for a 68% rebate:

259(3) If a person (other than a listed financial institution, a registrant prescribed for the purposes of subsection 188(5) and a person designated to be a municipality for the purposes of this section) is, on the last day of a claim period of the person or of the person's fiscal year that includes that claim period, a selected public service body, charity or qualifying non-profit organization, the Minister shall, subject to subsections (4.1) to (4.21) and (5), pay a rebate to the person equal to the total of

(a) the amount equal to the specified percentage of the non-creditable tax charged in respect of property or a service (other than a prescribed property or service) for the claim period, and

(b) the amount equal to the specified provincial percentage of the non-creditable tax charged in respect of property or a service (other than a prescribed property or service) for the claim period.

[23] Subsection 261(1) of the *Excise Tax Act* permits a person to apply for a rebate paid in error:

261(1) Where a person has paid an amount

- (a) as or on account of, or
- (b) that was taken into account as,

tax, net tax, penalty, interest or other obligation under this Part in circumstances where the amount was not payable or remittable by the person, whether the amount was paid by mistake or otherwise, the Minister shall, subject to subsections (2) and (3), pay a rebate of that amount to the person.

[24] Subsection 262(2) of the *Excise Tax Act* permits only one rebate application under Division VI with respect to any matter:

262(2) Only one application may be made under this Division for a rebate with respect to any matter.

[25] Division D of Part IX of the *Education Act* sets out the procedure for the vesting of control and charge of the administration of the affairs of a Board for the Minister. I have attached relevant portions as Appendix “A”.

[26] Though not part of the legislative framework, it is useful to set out at this stage parts of the Reciprocal Taxation Agreement of June 30, 2000,⁷ an agreement between Ontario and Canada:

1. The definitions in this clause apply in this agreement.
 - (a) “Federal Act” means the *Excise Tax Act*, R.S.C. 1985, c. E-15.
 - (b) “federal tax” means any tax imposed or levied under the Federal Act, other than the value-added tax.

...

⁷ Joint Book of Documents, Exhibit A-1, Volume 3, Tab 52.

- (f) “value-added tax” means any tax imposed or levied under Part IX of the Federal Act.

...

4. It is understood that neither Canada nor the Province is deemed, by reason of having entered into this agreement, to have surrendered or abandoned any of its powers, rights, privileges or authorities under the Constitution of Canada, or to have impaired any such powers, rights, privileges or authorities.

...

6. The Province agrees:

(a) ...

- (b) that provincial Crown corporations or agencies, other than the entities listed in Schedule A, shall pay the value-added tax in accordance with the Federal Act, as if that Act were applicable to them;

...

SCHEDULE A

...

Ministry of Education

Advisory Council on Special Education
Languages of Instruction Commission of Ontario
Ontario Parent Council
Ontario Student Assistance Appeal Board
Provincial Schools Authority
Selection Board (Ontario Graduate Scholarships)

[27] A representative of the Ministry of Finance for Ontario, Mr. Goethel, was involved with the negotiations of this Agreement. He testified that the purpose was for vendor simplicity in dealing with Government entities. He confirmed that only those Crown agencies listed in Schedule A remained immune from taxation. He also advised that no consideration was given to the question of school boards. The criteria used to determine what entities were accepted as Crown agents for purpose of Schedule A were:

- (i) They had to be a Crown agent.
- (ii) They could not be commercially competitive with the private sector.
- (iii) There must be national consistency.

[28] During the period the Reciprocal Taxation Agreement was in effect a couple of entities were added to the Schedule A list though the TDSB was not one of them.

Issues

[29] The overarching issue is whether, for the period August 2002 to February 2004, the TDSB was entitled to rebates of GST based on immunity from taxation pursuant to section 125 of the *Constitution Act, 1867* and section 122 of the *Excise Tax Act*. To answer this question, the Appellant argued that I must determine the following:

- (i) During the relevant period, was the TDSB part of or an agent of the Crown, entitling it to Crown immunity?
- (ii) If so, did the TDSB have standing to make the rebate claim and bring this appeal?
- (iii) If so, was its immunity affected by the Reciprocal Taxation Agreement?
- (iv) Does section 262 of the *Excise Tax Act* preclude the TDSB from claiming rebates paid by mistake, having already claimed rebates?

Analysis

- (i) *During the relevant period, was the TDSB part of or agent of the Crown entitling it to Crown immunity?*

[30] With respect to counsel and their able arguments, I suggest that the emphasis on Crown agency is misplaced. Section 125 of the *Constitution Act, 1867* specifically exempts from taxation “Lands or Property belonging to ... any Province”. The question to ask, therefore, is not whether there is a Crown agency (indeed the Respondent acknowledged the Government had *de jure* control of TDSB), but whether in the circumstances the GST was a tax on lands or property belonging to Ontario. In effect, by controlling the administration and affairs of the TDSB, did the

Province of Ontario become the owner of TDSB property? I have concluded it did not.

[31] A similar issue of immunity, though not in the context of a tax case, was dealt with by the British Columbia Court of Appeal in the case of *British Columbia Power Corporation Ltd. v. Attorney General of British Columbia and British Columbia Electric Co. Ltd.*⁸ In that case, there was a statutory agency pursuant to section 6(1) of the *Power Development Act, 1961*⁹ which stated “the Company is an agent of Her Majesty the Queen in right of the Province”. Chief Justice DesBrisay wrote:

7 The legislation in question does not purport to do more than constitute Her Majesty the sole shareholder of the appellant company and does not thereby vest in Her Majesty any property or funds of the appellant nor make it Her Majesty’s agent. It is quite clear that all the property and assets of the appellant company remain its own property and that it was the intent of the Act that this should be so. The funds to be paid over are not public funds. Its servants are not civil servants, it is not a government department and its property is not Crown property.

8 In my opinion the words “an agent of Her Majesty the Queen” as they appear in s. 6(1) cannot be taken to constitute the appellant company an agent of the Crown except in such cases as it performs a duty for or carries out a direction, or acts for or on behalf of Her Majesty, or deals with or otherwise acts in respect of or holds public funds or property of Her Majesty. It is clear, in my view, that in carrying out the directions of the Legislature the company does not act as an agent of the Crown. ...

[32] Also, Justice Sheppard in the same case stated:

16 As to the discovery orders, the Electric Company claims to be an agent of the Crown and so to have come within the prerogative right of the Crown to be immune from discovery; that is, it has become “servants of the Crown to such an extent as to bring them within the principle of the prerogative”: *Metropolitan Meat Industry Bd v. Sheedy*, [1927] A.C. 899, *per* Viscount Haldane at p. 905. For that purpose the company relies upon s. 6(1) of the statute which reads: “The Company is an agent of Her Majesty the Queen in right of the Province.” That section does not state the transactions in respect of which the relationship of agency exists nor the powers of the agent in dealing in those transactions: the company contends that under s. 6(1) it has been made the agent of the Crown “for all purposes and with power to act only as agent”.

⁸ [1962] B.C.J. No. 132 (B.C.C.A.).

⁹ *Power Development Act, 1961*, 1961 (B.C. 2nd Sess.), c. 4.

17 That construction meets difficulties. It adds words not found in the section and, in any event, the agency so defined does not necessarily bring the agent within the immunity. ...

[33] Also, in the Supreme Court of Canada decision of *Northern Pipeline Agency v. Perehinec*,¹⁰ where the issue was whether Northern Pipeline, as a Federal agency, could only be sued in Federal Court, Justice Estey stated:

In argument, the appellant and the respondent placed considerable emphasis on the question as to whether the appellant was an agent of the Crown. Indeed both of the courts below found such to be the case. For reasons which I will later set out, I do not think the answer to that question determines the outcome of this appeal.

...

Applying the principle of control as enunciated in the decisions of the Privy Council and of this Court, *supra*, (and as applied in the British Columbia Court of Appeal), to the statutory provisions establishing the appellant, it would appear that the appellant is indeed an agent of the Crown, at least in the discharge of its primary function of attending to the design, construction and installation of the pipeline. With this I respectfully concur in the conclusions reached in both courts below. However, as I observed at the outset, the determination of such a status or relationship does not determine the issue arising on this appeal. For that we must, in my view, turn to those provisions in the statute creating the Agency which relate to its power and authority to enter into the arrangements as described in paragraph 4 of the statement of claim, *supra*.

...

Having said all that, I think that the process leads back to the broad principle enunciated by Duff J., as he then was, in the Quebec Liquor Commission case, *supra*. The liability of the statutory body to action in the courts remains to be determined by a true interpretation of the statute in question. There have been some examples of this process in the provincial courts. ...

[34] I draw from these statements that I should look to the statute (the "*Education Act*") that gives the Ontario Government the *de jure* control, to determine whether there is anything therein that might connect immunity from taxation to a school board under administration. Given the context before me is a tax on Crown property, I must find something in the *Education Act* that effectively shifts ownership of the TDSB property to the Crown. Not only do I not find any such

¹⁰ [1983] 2 S.C.R. 513 at 3, 5 and 7.

provision, but I find wording emphasizing quite the opposite; that is, that ownership remains with the TDSB. There is no connection to immunity from taxation.

[35] Subsection 257.38(1) of the *Education Act* refers to “all money belonging to the board”. Clearly, this is a reference to TDSB money, over which the Crown had some control, but that does not make it Crown property. This provision reinforces the position that property remains property of the TDSB.

[36] More significant is section 257.43 of the *Education Act*, which is worth repeating at this stage:

257.43 Where a board has become subject to an order made under subsection 257.31 (2) or (3), all things done by or for the Minister under this Division in relation to the affairs of the board shall for all purposes be deemed to have been done by and for the board and in its name.

[emphasis added]

[37] There are two ways of looking at section 257.43. First, it can be viewed as a provision that acknowledges there may be sufficient control so as to constitute a common law Crown agency, but that statutorily, such agency is limited and does not render the Supervisor’s acts those of the Minister, but confirms that such acts are those of the Board. And certainly, any property acquired during the vesting period would be property of the Board, not of the Ministry, nor acquired on behalf of the Ministry. Again, the TDSB money was not Crown money regardless of whether I find a common law Crown agency to exist.

[38] A second way to view this provision would be as an overriding antidote to the common law Crown agency, denying such characterization altogether. The very legislation that creates the controlling features to find a common law Crown agency, also specifically rejects the notion of Crown agency in broad terms - “all things done” by the Supervisor are deemed to have been done by the Board.

[39] While it is unnecessary, given my approach, to reach a conclusion on the issue of a common law Crown agency, I will say a few words on the issue as the Appellant spent some time on this aspect of its argument. Firstly, there is no basis to conclude that the TDSB was somehow subsumed into and became a part of the Ministry of Education. It did not. The issue is whether the TDSB was an agent of the Crown.

[40] There are two ways in which an entity may be found to be an agent of the Crown: either by statute or by common law. TDSB was not designated a Crown agent by statute (indeed, as I have indicated, quite the contrary). The common law

test for the determination of a Crown agency is based on the degree of *de jure* control. In the Supreme Court of Canada decision of *Halifax (City) v. Halifax Harbour Commissioner*,¹¹ the Court stated the following regarding the Commissioners:

... their powers are derived from a statute of the Parliament of Canada; but they are subject at every turn in executing those powers to the control of the Governor representing His Majesty and acting on the advice of his Majesty's Privy Council for Canada, ...

I cannot doubt that the services contemplated by this legislation are, not only public services in the broad sense, but also, in the strictest sense, Government services; or that the occupation of the Government property with which we are concerned is, ... an occupation by persons "using" that property "exclusively in and for the service of the Crown."

[41] Further, in the case of *R. v. Eldorado Nuclear Ltd.*,¹² the Court stated:

At common law the question whether a person is an agent or servant of the Crown depends on the degree of control which the Crown, through its ministers, can exercise over the performance of his or its duties. The greater the control, the more likely it is that the person will be recognized as a Crown agent. Where a person, human or corporate, exercises substantial discretion, independent of ministerial control, the common law denies Crown agency status. The question is not how much independence the person has in fact, but how much he can assert by reason of the terms of appointment and nature of the official: ...

[42] The Minister of Education's appointee, Mr. Christie, clearly had *de facto* control over the administration and affairs of the TDSB. This was evident from his testimony, Mr. Tomczak's testimony and Mr. Higgins' testimony. The Trustees were completely without decision-making authority, as was clear from the two memoranda from Mr. Christie setting out the restrictions on Trustees' authority. Indeed, Mr. Christie made decisions that the Trustees themselves could not even have made, due to his all-encompassing power and his close association with the Conservative Government; for example, the decision to have a deficit budget in 2003-2004 could not have been made by the Trustees. Mr. Christie also micromanaged the affairs of the TDSB far beyond anything the TDSB Trustees would have done. The supervisor was in control of both governance and management-related matters. *De facto* control is so evident from the evidence, I see no need to explore this in any further detail.

¹¹ [1935] S.C.R. 215 at 8 and 9.

¹² [1983] 2 S.C.R. 551 at 573.

[43] As indicated however, it is not a matter of *de facto* control but *de jure* control. In this case, I am satisfied that one flowed from the other. Division D of Part IX of the *Education Act* does, as the Appellant argued, set out an extraordinary degree of control in circumstances where a vesting order is in place.

[44] In summary, the Minister has charge and control with respect to all matters. It could do anything and indeed, through Mr. Christie, it did do everything. Again, I have not deemed it necessary to expand on this issue of control as, firstly, I find the legislation and circumstances point clearly to both *de jure* and *de facto* control during both the Supervisor period and Co-management period, and secondly, because the Respondent acknowledged: “In the present case, while *de jure* control over the affairs of the Appellant pursuant to the vesting order was absolute during the life of the order. ...”

[45] So, both sides agree there is *de jure* control. The Appellant argues that such finding is sufficient to render the TDSB a part of, or an agent of, the Ontario Government, entitled to immunity. As I have already indicated, I do not agree that status alone entitles the TDSB to immunity from taxation.

[46] I find support for my view not only in the *Education Act* itself, as already explained, but also in case law. As the Supreme Court of Canada indicated in the case of *Nova Scotia Power Inc. v. Her Majesty the Queen*:¹³

14 The respondent submitted that NSPC, as an agent of the Crown, is immune from the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), by virtue of s. 17 of the *Interpretation Act*. But the jurisprudence imposes a second requirement before immunity from the statute in question will inure to the Crown agent. Immunity from legislation only exists where the entity was acting within the purposes for which the legislature made it an agent of the Crown: see *Eldorado Nuclear, supra*; *R. v. Canadian Broadcasting Corp.*, [1983] 1 S.C.R. 339 (S.C.C.); *Alberta Government Telephones v. Canada (Radio-Television & Telecommunications Commission)*, [1989] 2 S.C.R. 225 (S.C.C.).

[47] The purposes here for a Crown agency were to take over control and charge of the affairs of the Board – effectively, to run the Board. It did not extend to render Board property, Crown property. The Board had no authority, even under the control of the Supervisor to acquire property in the name of the Province of Ontario, as its

¹³ [2004] 3 S.C.R. 53.

agent or otherwise. Any Crown agency simply did not extend that far. The TDSB sought a rebate of GST, but in doing so, it was not seeking a rebate of Crown money.

[48] I refer again to the case of *Halifax (City) v. Halifax Harbour Commissioner* where it was clear not only that the Commissioners were subject at every turn to great control, but also that the property managed was Government property, which is simply not the case before me. Chief Justice Duff stated:

To state again, in more summary fashion, the nature of the powers and duties of the respondents: Their occupation is for the purpose of managing and administering the public harbour of Halifax and the properties belonging thereto which are the property of the Crown; ... [emphasis added]

...

Obviously, there is little relevant analogy between such a body and the respondents, whose duties mainly consist in managing and administering property which belongs to the Crown, ... [emphasis added]

[49] In summary, the TDSB cannot claim a rebate of money on the basis it was, as a Crown agent, spending Crown money. It was not spending Crown money. It was not in the same position as UPS in *United Parcel Service Canada Ltd. v. R.*,¹⁴ where clearly UPS was spending its principal's money. The purpose of the vesting order was not to transfer ownership of any TDSB property to the Crown: the purpose was to put the TDSB's financial affairs in order by giving control of the TDSB's affairs to a government appointee. While this may render the TDSB a Crown agent for the period of the vesting order, it was not an agent dealing with Crown property. While there is no need to consider the issue of standing, the Reciprocal Taxation Agreement or Section 262 of the *Excise Tax Act*, I do wish to briefly address the latter two issues.

[50] With respect to the Reciprocal Taxation Agreement, the parties' argument had something of an Alice in Wonderland feel to it. I was presented with a contract between the Government of Canada and the Province of Ontario which clearly stated that Provincial Crown corporations or agencies agree to pay the GST (Schedule A Crown corporations and agencies are excepted out). The TDSB was not on Schedule A, notwithstanding the Appellant's argument that it was a type of Crown agent that should have been on Schedule A (an argument I did not find persuasive). The Reciprocal Taxation Agreement struck me as a complete answer to the Appellant's

¹⁴ 2008 FCA 48.

position, yet both parties suggested that the Tax Court had no authority to enforce the contract between Ontario and Canada, and that is what I would be doing if I relied on the provisions of the Reciprocal Taxation Agreement to deny the TDSB claim. I presume the parties believe that the correct procedure, had I found the TDSB could successfully claim immunity from taxation (without reference to the Reciprocal Taxation Agreement) was for the parties to then arbitrate the matter for an interpretation of the Reciprocal Taxation Agreement, to determine if it waived such immunity for the TDSB. I would have happily run the risk of short-cutting such unnecessary and prolonged litigation by grabbing the contract by the horns and giving it an interpretation that I suggest is clear on its face: the TDSB is not on Schedule A and it is, therefore, not immune from taxation and the assessment was therefore correct.

[51] Finally, with respect to the application of section 262 of the *Excise Tax Act*, I would have had no difficulty, notwithstanding the interpretation given to that section in completely different circumstances in the case of *Fanshawe College of Applied Arts & Technology v. R.*,¹⁵ finding that an application for a rebate of 32% based on an error is certainly a different matter than an application for a rebate of 68% pursuant to subsection 259(3) of the *Excise Tax Act*.

[52] In conclusion, I have found that during the vesting order period, TDSB was an agent of the Crown, yet the authority of TDSB as a Crown agent pursuant to the *Education Act* did not extend to make the property, including TDSB's funds used by it to acquire property and services, property of the Province of Ontario. The purpose for which the TDSB became a Crown agent was not to divest itself of all its property, but to subject itself to the control of its affairs by the Government of Ontario. Although this might seem to be a fine distinction, it is a distinction nonetheless which leads to the inevitable conclusion that the TDSB did not pay the GST by mistake. The case is dismissed with costs to the Respondent.

Signed at Ottawa, Canada, this 20th day of January 2009.

“Campbell J. Miller”

C. Miller J.

¹⁵ 2006 TCC 652, 2006 CarswellNat 4124.

Appendix “A”

Excerpts from *Education Act*, Division D – Part IX

- 257.31(3) If the Minister advises the Lieutenant Governor in Council that he or she is of the opinion that the board has failed to comply with a direction given under subsection (1), the Lieutenant Governor in Council may make any order that the Lieutenant Governor in Council considers necessary or advisable to vest in the Ministry control and charge over the administration of the affairs of the board.
- (4) ...
- 257.32(1) Where a board is subject to an order under subsection 257.31(2) or (3),
- (a) the Minister shall publish notice of the order in *The Ontario Gazette*; and
- (b) the persons directed by the Minister to do so shall give notice of the order to the persons specified by the Minister, in the form specified by the Minister.
- (2) After notice has been published in *The Ontario Gazette* under clause (1) (a),
- (a) no proceeding against the board shall be commenced or continued in any court without leave of the Minister; and
- (b) no order of any court shall be enforced against the board without leave of the Minister.
- (3) Subject to subsection (4), where the commencement or continuance of any proceeding or the enforcement of a court order is prevented under this section,
- (a) the running of any limitation period relating to the proceeding or enforcement is suspended until the Minister gives leave to commence or continue the proceeding or to enforce the court order, as the case may be; and
- (b) the person having the right to commence or continue the proceeding or to enforce the court order shall, immediately after the leave is given, have the same length of time within

which to commence or continue the proceeding or enforce the court order, as the case may be, as the person had when the notice was published in *The Ontario Gazette* under clause (1) (a).

- (4) Subsection (3) does not apply unless application is made to the Minister for leave to commence or continue the proceeding or to enforce the order within the relevant limitation period and the Minister refuses to give the leave.
- (5) Subsection (2) does not apply in relation to a board that is subject to an order under subsection 257.31(2) or (3) after the Minister makes an order under clause 257.34(2)(b) or (i) with respect to the board.

257.33(1) Where the Lieutenant Governor in Council has made an order under subsection 257.31(2) or (3) in respect of a board, the Minister has control and charge over the board generally with respect to any matter in any way affecting the board's affairs.

(2) Without limiting the generality of subsection (1), where the Lieutenant Governor in Council has made an order under subsection 257.31(2) or (3) in respect of a board, the Minister has control and charge over the exercise and performance by the board of its powers, duties and obligations with respect to all matters, including but not limited to matters respecting,

- (a) the appointment and dismissal of the board's officers and employees and their powers, duties, salaries and remuneration;
- (b) the board's revenues and expenditures;
- (c) the board's sinking funds, retirement funds and the funds prescribed under clause 247(3)(e) and the money belonging to those funds;
- (d) the board's accounting and audit systems and dealings with the board's assets, liabilities, revenues and expenditures;
- (e) the yearly or other estimates of the board, financial statements of the board and other reports of the board required by the Minister as well as the form, preparation and completion of them, and the times when they shall be made;

- (f) the amounts to be provided for in the yearly or other estimates;
- (g) the borrowing of money for the current expenditures of the board until the current revenue has been received;
- (h) the imposition, charging and collection of all fees, charges and expenses;
- (i) the sale or other disposition of any of the board's assets.

...

257.38(1) Where a board is subject to an order under subsection 257.31(2) or (3), the Minister has full charge and control over all money belonging to the board and received by any person for or on its behalf and the money shall be deposited in one of the following institutions, to be designated by the board or, in the absence of designation by the board, by the Minister:

1. A bank listed in Schedule I or II to the *Bank Act* (Canada).
2. Repealed: 2002, c. 8, Sched. I, s. 8.
3. A loan or trust corporation registered under the *Loan and Trust Corporations Act*.
4. A credit union as defined in section 1 of the *Credit Unions and Caisses Populaires Act, 1994*.

...

257.43 Where a board has become subject to an order made under subsection 257.31(2) or (3), all things done by or for the Minister under this Division in relation to the affairs of the board shall for all purposes be deemed to have been done by and for the board and in its name.

257.44 Where a board is subject to an order under subsection 257.31(2) or (3), the Minister shall have access at all times to all records of the board, including but not limited to all by-laws, assessment rolls, collectors' rolls, minute books, books of account, vouchers and other records relating to the board's financial transactions, and may inspect and copy them.

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AND HER MAJESTY THE QUEEN

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APPEARANCES:

Counsel for the Appellant: Salvatore Mirandola and
Jennifer Leve

Counsel for the Respondent: Ernest Wheeler

COUNSEL OF RECORD:

For the Appellant:

Name: Salvatore Mirandola

Firm: Borden Ladner Gervais LLP
Toronto, Ontario

For the Respondent:

John H. Sims, Q.C.
Deputy Attorney General of Canada
Ottawa, Canada